Supreme Court, U.S.
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CASE NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

LLOYD VICKROY,
Petitioner

vs.

ROCKWELL INTERNATIONAL CORPORATION,
AUTONETICS ELECTRONICS SYSTEMS,
Respondent

On Writ of Certiorari to the
Court of Appeal for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

DALE M. FIOLA #76397
Attorney for Petitioner

1678 West Broadway, Suite 101
Anaheim, California 92802
(714) 776-3840

QUESTIONS PRESENTED

1. Was it error for the District Court and for the Ninth Circuit, not to characterize the Complaint to include a claim under the Fair Labor Standards Act (FLSA) when similar state labor claims had been alleged?

2. Was it error for the District Court, and for the Ninth Circuit to find that res judicata barred VICKROY'S second action when there were viable FLSA claims that had not been considered by the court?

3. If the Union elected not to arbitrate a grievance, does the grievant have the right to pursue arbitration on his own behalf?

4. Are California Labor Code Sections 200 et seq. providing for the recovery of overtime compensation, penalties and interest by an employee preempted by Section 301 of Labor Management Relations Act?

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DALE M. FIOLA #76397
Attorney for Petitioner

1678 West Broadway, #101
Anaheim, California 92802
(714) 776-3840

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

The Petitioner, LLOYD VICKROY, prays that a Writ of Certiorari be issued to review the Order granting Respondent ROCKWELL INTERNATIONAL CORPORATION'S (ROCKWELL) Motion for Summary Judgment on October 27, 1992, and the decision of the United States Court of Appeal for the Ninth Circuit affirming the decision of the lower court and denying a Petition for Rehearing on October 26, 1993. Furthermore, Petitioner requests this court to review the Order and Judgment on the first action entitled LLOYD VICKROY vs. ROCKWELL INTERNATIONAL CORPORATION, AUTONETICS ELECTRONICS SYSTEMS, Case No. CV 89-5321 RB (Ex), hereinafter referred to as VICKROY I, filed on July 23, 1990 and the Order of

the United States Court of Appeals for the Ninth Circuit denying Petitioner rehearing on July 18, 1991, on the ground that res judicata was asserted in the second action, LLOYD VICKROY vs. ROCKWELL INTERNATIONAL CORPORATION; RICHARD C. SEAMANS; DAVID SHAPIRO; MARC KARTMAN; WILLIAM R. HARTMAN, JR.; GARY PHELPS, Case entitled CV 92-9428 AAH, hereinafter referred to as VICKROY II.

OPINIONS BELOW

The District Court's Order granting ROCKWELL'S Motion for Summary Judgment, dated October 27, 1992, on VICKROY II is printed in Appendix "A" hereto, infra. The decision of the United States Court of Appeals for the Ninth Circuit, filed October 26, 1993, unreported and is printed in Appendix "A" hereto. The Order and Judgment of the District Court on VICKROY I, filed July 23, 1990, is

printed in Appendix "A" hereto. The United States Court of Appeals for the Ninth Circuit decision in VICKROY I, filed June 4, 1991, is unreported and printed in Appendix "A" hereto. The United States Court of Appeals for the Ninth Circuit Order denying the Petition for rehearing, filed July 18, 1991, is unreported and printed in Appendix "A" hereto.

JURISDICTION

The Order granting ROCKWELL'S Motion for Summary Judgment in the United States District Court, Central District of California, on VICKROY II and the decision of the United States Court of Appeals for the Ninth Circuit affirming the decision of the District Court and denying the Petition for Rehearing was filed respectively on October 27, 1992 and October 26, 1993.

This Petition for Writ Certiorari was filed within 90 days of the decision of the Ninth Circuit denying the Petition for rehearing. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254.

QUESTIONS PRESENTED

1. Was it error for the District Court and for the Ninth Circuit not to characterize the Complaint to include a claim under the Fair Labor Standards Act (FLSA) when similar state labor claims had been alleged?

2. Was it error for the District Court, and for the Ninth Circuit to find that res judicata barred VICKROY'S second action when there were viable FLSA claims that had not been considered by the court?

3. If the Union elected not to arbitrate a grievance, does the grievant

have the right to pursue arbitration on his own behalf?

4. Are California Labor Code sections providing for the recovery of overtime compensation, penalties and interest by an employee preempted by Section 301 of Labor Management Relations Act?

STATUTES INVOLVED

Fair Labor Standards Act (FLSA), 29 U.S.C. Sections 213-217.

Civil Rights Act of 1866 (42 U.S.C. Sections 1981 and 1983).

Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 158 et seq. California Labor Code Section 200 et seq.

STATEMENT OF CASE

Petitioner VICKROY on July 20, 1989 filed in the Superior Court of California, County of Orange, a

Complaint for wages, violation of contract, damages and penalties against ROCKWELL INTERNATIONAL CORPORATION. On September 7, 1989, ROCKWELL removed the action from the Superior Court to the Federal District Court. The ground for said removal was that Section 301(a) of the Labor-Management Act of 1947 was a federal question governing the terms and conditions of the collective bargaining agreement in effect in which VICKROY was exclusively represented by the International Brotherhood of Electrical Workers (IBEW). On October 19, 1989, the United States District Court granted removal because of the federal question involving Section 301(a) LMRA (28 U.S.C. Section 185(a). On April 9, 1990, VICKROY filed an Amended Complaint which alleged violations of 42 U.S.C. Section 1981 and 1983 and California Labor Code,

Sections 200(a)(b); 204(b); 206(a); 216(a), (b) along with 29 U.S.C. Section 158(a) and 28 U.S.C. Section 1343(2). In his complaint at paragraph 4, VICKROY alleges that ROCKWELL knowingly, negligently, willfully and fraudulently failed to pay him all of his wages including, but not limited to overtime compensation. In his original complaint, VICKROY specifically stated "that on January 8, 1988, Defendant did fail to make payment of the unscheduled day of overtime worked by the Plaintiff on December 31, 1987." That original complaint was attached to the Notice of Removal as an Exhibit "A" by ROCKWELL. On June 25, 1990, ROCKWELL filed a Motion for Summary Judgment claiming that VICKROY'S state claims were preempted by the LMRA and that the six-month statute of limitations established

by Section 10(b) of the National Labor Relations Act, 29 U.S.C. Section 160(b) was applicable to VICKROY'S claims under Section 301 of the LMRA. Del Costello vs. Teamsters, 46 U.S. 151, 103 S.ct. 2281 (1983). ROCKWELL in support of its claim that there were no genuine issues of material fact stated that VICKROY'S contentions with respect to pay are not actionable under 29 U.S.C. Section 1981. On July 23, 1990, the matter was heard before Honorable Robert C. Bonner, Judge presiding. Transcripts of the hearing confirm that the court granted Summary Judgment ruling that Section 301 of the LMRA preempted most, if not all, of VICKROY'S claims. The court also determined that VICKROY'S California Labor Code claims were preempted under Section 301 of LMRA. The court determined that the Supreme Court

decision of Patterson vs. McLean, 109 S.Ct. 2363 (1989), limited the scope of a Section 1981 claim to the making and enforcement of contract and that the function of enforcement of a contract was not involved with VICKROY'S claims for overtime compensation. Lastly, the court determined that any Section 1983 claim was not viable inasmuch as ROCKWELL was not acting under color of state law. On July 23, 1990, District Judge Bonner executed the Order and Judgment in favor of ROCKWELL. On July 27, 1990, VICKROY filed a Notice of Appeal. The matter was briefed and, on June 4, 1991, United States Court of Appeals for the Ninth Circuit found that non-payment of overtime wages is not protected by Section 1981, that there was no color of state law that would implicate a violation of 29 U.S.C.

Section 1983, that the statute of limitations on a claim of breach of the duty of fair representation is six months as established by the Del Costello case, infra, and that VICKROY'S state labor law claims are preempted by Section 301 of LMRA. The Ninth Circuit found that there was no genuine issue of material fact and affirmed the granting of Summary Judgment. VICKROY filed a Petition for Rehearing to the Ninth Circuit which was denied on July 18, 1991.

On January 22, 1992, VICKROY filed a Complaint in VICKROY II. On February 19, 1992, ROCKWELL answered the Complaint. On September 4, 1992, ROCKWELL filed a Motion for Summary Judgment along with a Statement of Uncontroverted Facts and Conclusions of Law. On October 14, 1992, VICKROY filed

opposition to said Motion. On October 27, 1992, the court granted ROCKWELL'S Motion for Summary Judgment. Summary Judgment was filed and entered on October 29, 1992. In a two page decision, Honorable A. Andrew Hauk, Senior United States District Judge, ruled that there was no genuine issue of material fact finding that Summary Judgment on the same issue was barred by the principle of res judicata, referring to the decision of Federated Department Stores, Inc. vs. Moite, 452 U.S. 394, (1981). On November 2, 1992, VICKROY filed a Notice of Appeal to the Ninth Circuit. On or about June 18, 1993, United States Court of Appeals for the Ninth Circuit affirmed the District Court's decision granting ROCKWELL'S Motion for Summary Judgment. On October 26, 1993, VICKROY'S Petition for

Rehearing was denied.

STATEMENT OF FACTS

Petitioner VICKROY has worked for ROCKWELL as an Electronic Electrician since September 15, 1980 and is currently employed there. Throughout his employment, Petitioner was a member of the International Brotherhood of Electrical Workers, Local 2295 ("IBEW"). IBEW was the exclusive bargaining representative for VICKROY during the time of his employment with ROCKWELL. The employment of VICKROY with ROCKWELL was subject to the provisions of several contracts between ROCKWELL and IBEW. The contract that governed VICKROY'S employment during the time of the non-payment of overtime compensation was the "Agreement between ROCKWELL INTERNATIONAL CORPORATION and

International Brotherhood of Electrical Workers effective September 20, 1987" (hereinafter referred to as "the Collective Bargaining Agreement"). Article XVI, Section 4 of the Collective Bargaining Agreement covers the subject of overtime compensation. Article XVII, Section 8, covers the subject of paydays. Articles V and VI cover the subject of grievances and arbitrations, respectively.

During the last week of December of 1987, ROCKWELL closed its facilities except for emergency work. VICKROY was scheduled to work overtime during the shutdown period and in fact worked such overtime. On December 30, 1987, VICKROY was asked by his supervisor to work overtime on December 31, 1987. During the shutdown period, the payroll department was open. VICKROY was

entitled to receive his overtime pay check on Friday, January 8, 1988 for the work he had completed on December 31, 1987. But for some unexplained reason, on January 8, 1988, Petitioner never received such compensation. On January 11, 1988, VICKROY filed a grievance with IBEW under the Collective Bargaining Agreement concerning the non-payment of overtime on December 31, 1987. Thereafter, ROCKWELL made some effort to surrender the payroll check for overtime compensation to him, but VICKROY refused the check because it did not include interest lost or penalties associated with the failure to pay on January 8th. Upset with the situation, ROCKWELL issued VICKROY 25 penalty points under the plant disciplinary rules for interfering with the efficient operation of the payroll department. Thereafter,

VICKROY filed a grievance protesting the penalty points claiming that it was in retaliation for his filing a grievance with respect to the overtime compensation. VICKROY further contended that his refusal to accept the overtime check submitted by ROCKWELL without payment of additional penalty or interest was supported by his fear that by accepting the check he would be compromising or waiving his grievance. At certain points when ROCKWELL presented the overtime check, VICKROY asked for assurances that his receipt of said overtime check would not compromise or waive his grievance. To further its efforts to harass VICKROY, ROCKWELL suspended VICKROY on March 23rd, 24th, and 25th for interfering with the efficient operation of the payroll department and he was denied pay during

the suspension period. VICKROY filed another grievance with IBEW protesting his suspension. In July of 1988, ROCKWELL and IBEW resolved all of VICKROY'S grievances related to his payroll check, without first obtaining the consent of VICKROY. VICKROY maintains that these grievances have not been resolved and that he had requested that the matter be sent to arbitration. To this date, VICKROY has not received the overtime compensation with payment of the appropriate interest and penalties.

VICKROY contended that the union should have taken the matter to arbitration and when it chose not to arbitrate, VICKROY filed suit to compel arbitration. VICKROY filed suit alleging violation of California Labor Code Sections with respect to

retaliation and discrimination after making a claim for overtime compensation.

The lower courts determined that preemption barred all of the claims of VICKROY and that there was no genuine issue of material fact.

Based on the foregoing Statement of Facts and Statement of Case, and the Nature of the Action and Relief sought, Petitioner raises the following questions.

REASONS FOR GRANTING WRIT

1. REVIEWING AND DISTRICT COURT ERRED IN NOT CHARACTERIZING PETITIONER'S COMPLAINT AS AN FLSA CLAIM WHEN SIMILAR STATE LABOR CLAIMS HAD BEEN ALLEGED.

The District Court and the Court of Appeal for the Ninth Circuit failed to characterize VICKROY'S Complaint as

entitling him to an action based on violation of the Fair Labor Standards Act (FLSA). It is undisputed that the Complaints filed by VICKROY, in VICKROY I and VICKROY II, dealt with ROCKWELL'S failure to pay overtime compensation to VICKROY. In all circumstances, the courts were aware that VICKROY was representing himself in pro se and did not have the benefit of legal representation to fashion the complaint under the appropriate legal theory for the redress being sought. The District Court as well as the Court of Appeal should have characterized the facts of the Complaint to support any valid claim entitling VICKROY to relief not necessarily the one intended by VICKROY. A complaint should not be dismissed, nor should judgment be ordered based solely upon a plaintiff's erroneous reliance on

the wrong legal theory if the facts alleged support any valid claim. Haddock vs. Board of Dental Examiners of California (9th Cir., 1985), 777 F.2d 462, 464. In the Haddock case, the plaintiff sued the State Board of Dental Examiners claiming that they had intentionally lowered his examination scores because of his race under Title VII of the Civil Rights Act of 1964. Later a Motion to Dismiss was granted as to the Title VII claim. However, the Court of Appeal found that the facts of the case would support a claim under 42 U.S.C. Section 1983 and the Fourteenth Amendment and the complaint should not have been dismissed.

It has been held that for purposes of granting a Motion for Summary Judgment against a Plaintiff, in propria personna, the pro se complaint should be

read liberally and not dismissed "unless it appears certain that plaintiff can prove no set of facts that would entitle him to relief. See Berg v. Kincheloe (9th Cir. 1986) 794 F.2d 457, 461. In a case involving a Section 1983 claim, the 9th Circuit ruled the District Court's dismissal of the action without prejudice was erroneous. All that the plaintiff was required to do is to state facts justifying relief and was not required to state the statutory or constitutional basis for his claim. See McCalden v. California Library Association (9th Cir. 1990), 919 F.2d 538, 546. In the Supreme Court decision of Haines v. Kerner 404 U.S. 519, 520-521, the order granting dismissal of the action was reversed and remanded with the court stating:

"We cannot say with assurance

that under the allegations of the pro se complaint, which we hold to less stringent standards that formal pleadings drafted by lawyers, it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

See Haines v. Kerner 404 U.S. 519, 520-521. See Conley v. Gibson, 355 U.S. 41 45-46 (1957) and Dioguardi v. Durning, 139 F.2d 774 (2nd Cir. 1944)

It has even been held that when the Court dismisses a pro se complaint for failure to state a claim, the court should draft a few sentences explaining to the Plaintiff the deficiencies and allow the Plaintiff to amend. See Sands v. Lewis (9th Cir. 1989), 886 F.2d 1166, 1171-1172. See also Hernandez v. Denton

(9th Cir. 1988), 861 F.2d 1421-1423. See also Karim-Panahi v. Los Angeles Police Department (9th Cir. 1988), 839 F.2d 621, 623. A pro se litigant should be given or must be given leave to amend his or her complaint unless it is absolutely clear that the deficiencies of the complaint could not be cured by amendment. Sands, supra, 1168.

It is undisputed that Appellate and District Courts relied upon the preemptive effect of Section 301 of LMRA to bar most, if not all, the claims of VICKROY, including his State Labor Code violations. In his original complaint VICKROY alleged that ROCKWELL violated Labor Code Section 216(b) along with Labor Code Sections 200(a)(b) and 204b and 206(a). California Labor Code Section 204 specifically states:

"Notwithstanding any other

provision of this section, all wages earned for labor in excess of the normal work period shall be paid no later than the payday for the next regular payroll period. However, when employees are covered by a collective bargaining agreement that provides different pay arrangements, those arrangements shall apply to the covered employees."

California Labor Code Section 204b specifically provides:

"Labor performed by a weekly-paid employee during any calendar week and prior to or on the regular payday shall be paid for not later than the regular payday of the employer for such weekly-paid employee falling during the

following calendar week."

"Labor performed by a weekly-paid employee during any calendar week and subsequent to the regular payday shall be paid for not later than seven days after the regular payday of the employer for such weekly-paid employee falling during following calendar week."

California Labor Code, Section 206(a) specifically provides:

"In case of a dispute over wages, the employer shall pay, without condition and within the time set by this article, all wages, or parts thereof, conceded by him to be due, leaving to the employee all remedies he might otherwise be entitled to as to any balance claimed."

California Labor Code Section 1126 specifically provides:

> "Any collective bargaining agreement between an employer and a labor organization shall be enforceable at law or in equity, and a breach of such collective bargaining agreement by any party thereto shall be subject to the same remedies, including injunctive relief, as are available on other contracts in the courts of this State."

It should have been reasonably apparent to the Appellate and District Courts that VICKROY'S claims for overtime compensation involved a federal question - a technical violation of FLSA. The Appellate and reviewing courts made no effort to characterize VICKROY'S complaint as an FLSA

complaint, nor did they make any ruling that the FLSA claim was preempted by Section 301 of LMRA. There were sufficient factual allegations to support an FLSA claim. The FLSA regulates, principally, wages and hours of work in private and public employment. In order for an employee to be covered by the FLSA: (1) There must be an employer-employee relationship; (2) The individual employee must personally be engaged in commerce or in the production of goods for commerce, or the employee must be employed by an employer in an enterprise engaged in commerce or in the production of goods for commerce; (3) The employee must be within the geographical scope of coverage of the FLSA. There is no question that VICKROY met all the requirements to be covered by FLSA. He

was an employee of ROCKWELL and ROCKWELL was and is engaged in the production of goods for commerce and that VICKROY worked within the geographical scope of the coverage which was within the territories or possessions of the United States. A complaint under FLSA must contain a short and plain statement of claim that shows that plaintiff is entitled to relief for the employer's failure to pay overtime. Patterson vs. Allied Chemical and Dye Corp. (1947), 69 F.Supp. 804. A complaint to recover overtime compensation should state the rate of pay or wages paid and the amount of unpaid overtime. McCloskey & Co. vs. Eckhart (1947, 5th Cir.), 164 F.2d 257.

It was clear from the pleadings that VICKROY was seeking overtime compensation, which was unpaid, and that he was subject to retaliatory treatment

on the job after filing a grievance with respect to the non-payment of overtime compensation. These claims were within the purview of the FLSA. The failure of the court to so characterize the pleadings to include the FLSA claim was reversible error.

2. **VICKROY'S FLSA CLAIM ARE NOT BARRED BY RES JUDICATA BECAUSE THEY WERE NEVER CONSIDERED BY THE LOWER OR APPELLATE COURTS.**

The general rule of res judicata provides that when a court of competent jurisdiction has entered a valid final judgment on the merits of a cause of action, the parties to the suit and their privities are thereafter bound, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which

might have been offered for that purpose. In order for a judgment to have res judicata effect it must be valid, final and on the merits. Although it is true that a second suit which is based upon the same cause of action as to a prior suit, the judgment upon the merits in the first suit is an absolute bar to the second suit not only in respect of every matter actually offered and received to sustain the demand in the first suit, but also as to every ground of recovery which might or should have been presented. Sea-land Services, Inc. vs. Gaudet (1974), 414 U.S. 573; Baltimore S.S. Co. vs. Phillips (1927), 274 U.S. 316. It has been held that the conclusive effect of a judgment on the merits as res judicata does not operate to bar an action on a different cause of action. If the

actions are not based on identical grounds res judicata does not apply. In this case VICKROY I dealt with violation of the California Labor Code and VICKROY II dealt with the violation of the Fifth Amendment to the United States Constitution. In both cases, the court could have characterized the complaint as involving FLSA violations, but chose, for whatever reason, not to so characterize. The lower court and Appellate court erroneously ruled that the causes were preempted by Section 301 of the LMRA and the claims were barred under the six-month statute of limitation as expressed in the decision of Del Costello, supra. The lower and Appellate Courts failed to follow the FLSA statute of limitations which is two years after the cause of action accrued or where a wilful violation is shown a

three year statute of limitations. See 29 U.S.C. Section 255(a). It has been held that a new cause of action accrues each time an employer fails to pay full compensation on the regular payday. Shandelman vs. Schuman (1950), 92 F.Supp. 334. Thus, under any rationale the complaints filed in VICKROY I and VICKROY II were timely filed within the statute of limitation, and that the Section 301 six-month statute is inapplicable.

The court committed error in failing to characterize the complaint as an FLSA complaint and then applied the wrong law, the law relative to Section 301 of the LMRA. Therefore, the legal theory of the FLSA claim is different than the legal claims that were allegedly adjudicated by Summary Judgment. Therefore, it was erroneous

for the District Court on October 27, 1992 to rule that res judicata applied in barring VICKROY II. It was also erroneous for the Appellate Court to affirm the lower court's granting of Summary Judgment.

3. **WHERE A UNION ELECTS NOT TO ARBITRATE A GRIEVANCE, GRIEVANT SHOULD BE PERMITTED TO CONTINUE WITH ARBITRATION WITHOUT HIS UNION.**

The decision of Vaca vs. Sipes (1967), 386 U.S. 171, established the principle that an individual employee does not have an absolute right to have a grievance against his employer taken to arbitration, regardless of the provisions of the applicable collective bargaining contract. The failure of IBEW to take the matter to arbitration and elected not to go to arbitration, thereby frees the employee up to pursue

arbitration through independent means. If the employer refuses to arbitrate in absence of the union, then the grievant/employee's only option is to file a lawsuit to compel arbitration. A suit can be brought under 29 U.S.C. Section 185 to compel arbitration in which the court has the ability to compel that the dispute be resolved through arbitration. See United Steelworkers of America vs. Wayer and Golf Navigation Co. (1960), 363 U.S. 574. Type Trades Council UA Local 159 vs. Underground Contractors Association (1987, 9th Cir.), 835 F.2d 1275.

It was therefore error for the District and Appellate Courts to determine that VICKROY'S request for arbitration was non-actionable when he had the right to seek arbitration, once IBEW chose not to pursue the matter to

arbitration.

4. **VICKROY'S STATE LABOR CLAIMS SHOULD HAVE BEEN CHARACTERIZED AS AN FLSA CLAIM AND WERE NOT PREEMPTED BY SECTION 301 OF THE LMRA.**

Had VICKROY'S complaint been characterized as an FLSA action, there would have been little or no need to remove the case. It has been held that claims under 29 U.S.C. Section 216(b) are maintainable in state court and should not be removed. Johnson vs. Butler Brothers (1947, 8th Cir.), 162 F.2d 87. Several case decisions recently support the concurrent jurisdiction over FLSA actions. Nieves vs. Deshler (1983), 561 F.Supp. 1173.

Even if the action was removed, there was no requirement on the part of VICKROY that he needed to submit the matter to arbitration through the

collective bargaining agreement. Application of Susquehanna Collieries Co. (1943), 49 F.Supp. 845; Phillips vs. Carborundum Co. (1973), 361 F.Supp. 1016. In bringing an FLSA action it is not necessary to join the labor union to the action. It is discretionary as to whether or not the labor union may be joined. See Bowe vs. Judson C. Burns, Inc. (1943, 3rd Cir.), 137 F.2d 37. It has been held that an FLSA case is proper when an employee brings an action for overtime compensation or to obtain appropriate relief, legal or equitable, against an employer who violated the prohibition against retaliatory acts contained in 29 U.S.C. Section 215(a)(3). See 29 U.S.C. Section 216(b). In VICKROY, there is no dispute that VICKROY had set forth sufficient allegations to substantiate retaliatory

action on the part of ROCKWELL in penalizing him 25 points under ROCKWELL'S disciplinary program and then suspending him for three days without pay. Such facts support a violation of the FLSA. The lower courts were in error in failing to realize that there was a viable legal theory that VICKROY could have asserted in lieu of his state labor code claims. Summary Judgment should have been denied since Section 301 of the LMRA does not bar an FLSA claim. It is correct that in many circumstances involving labor relations, Section 301 of the LMRA preempts state law claims because resolution requires the interpretation of the collective bargaining agreement. Lingle vs. Norge Division of Magic Chef, Inc. 486 U.S. 399, 413 (1988), Harris vs. Alumax Mill Products, Inc. 897 F.2d 400, 403 (9th

Cir.). However, there is no case decision that bars an FLSA claim because of Section 301 of the LMRA. Recently in the 9th Circuit decision of Livadas v. Aubry 987 F.2d 552 (9th Cir., 1991), Circuit Judge Kozinski in his dissenting opinion raises the issue of California Labor Code Section 229 with respect to denial of state law benefits because one is covered by a collective bargaining agreement. Kozinski squared off the issue by stating that where state laws interfere with the National Labor policy, those state laws are preempted. He goes on to state at page 562:

> "The question of preemption is, of course, significant. To the extent the commissioner's enforcement of Section 201 of the California Labor Code conflicts with Federal law, the

commissioner is without authority to act. But once we step outside the arena of actual preemption, Federal law imposes no obligation on the commissioner to refrain from acting. And his refusal to act simply because the employee is covered by a CBA raises a serious question of anti-union discrimination. The majority's attempt to find safety between the pendulum of preemption and the pit of unlawful discrimination is simply unavailing."

In his dissenting opinion, Kozinski states that there is no preemption by Federal Labor Law with respect to California Labor Code, Section 201, et seq. As he states justifying his position at page 562:

"State law claims that are

preempted by Federal Labor law if they are inextricably intertwined with consideration of the terms of the labor contract. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 213 (1985). We have interpreted this language to require Federal preemption of state-law causes of action for violating a CBA, founded on rights created by a CBA or substantially dependent on or governed by the terms of CBA. See Paige v. Henry J. Kaiser, Co., 826 F.2d 857, 861 (9th Cir. 1987), Cert. denied, 486 U.S. 1054 (1988). On the other hand, there is no incapability between Federal Rules designed to restore the equality of bargaining power and state . . . legislation that impose minimal substantive requirements on

contract terms negotiated between parties to labor agreements. Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724, 754 (1985). In Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988), the Supreme Court held that state-law claims are independent of the CBA and therefore not preempted where resolution of the state-law claim does not require construing the collective bargaining agreement. Id. at 407, 108 S.Ct. at 1882.

"In Galvez v. Kuhn, 933 F.2d 773 (9th Cir. 1991), we interpreted Lingle and held that employee's claim for assault and battery based on unsafe working conditions was not preempted, even though there were provisions in the

CBA that governed the work environment. Because the employee's claim alleged violation of a duty owed to all citizens, the state-law claim could be decided without reference to the CBA. Id. at 777 (emphasis added);

See also Operating Engineers Pension Trust v. Wilson, 915 F.2d 535 (9th Cir. 1990) (State-law action for fraud in the inducement not preempted because independent of rights under CBA)."

Justice Kozinski relies upon Lingle and cites:

"A collective bargaining agreement may, of course, contain information such as rate of pay and other economic benefits that might be helpful in determining the damages to which a worker

prevailing in a state-law suit is entitled. . .

In such a case, federal law would govern the interpretation of the agreement, but the separate state-law analysis would not be thereby preempted. 486 U.S. at 413 N 12 (emphasis added)."

Kozinsky concludes that denying a valuable benefit to employees simply because they are covered by CBA does not burden the exercise of rights protected by the NLRA.

Preemption of one federal statute by another has never been fully resolved by this court. It would seem that the FLSA claim survived independent of the Section 301 claim even though resort must be had to interpret the terms of the collective bargaining agreement. Since the union does not have to be

joined in an FLSA claim, it appears that Section 301 of LMRA does not preempt the FLSA claim. Any and all claims involving the state labor code involving the recovery of overtime, penalties and interest are not barred by Section 301. For these reasons, it was error for the Appellate and District Courts to determine that the Section 301 LMRA preempted VICKROY'S state labor law claims.

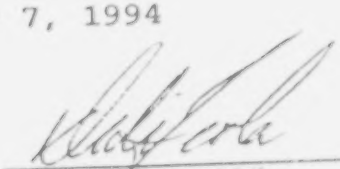
CONCLUSION

Based on the foregoing facts and law, the reviewing court should have reversed the judgment of the lower court.

WHEREFORE, for the reasons herein advanced, and on the authorities cited, Petitioner LLOYD VICKROY respectfully urges a review be granted and that this court reverse the decision of the Court

of Appeals and the order of the District Court granting Summary Judgment and remand this case to the lower court for further proceedings, including the trial of the cause.

DATED: January 7, 1994



DALE M. FIOLA
Attorney for Petitioner
LLOYD VICKROY

APPENDIX

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LLOYD VICKROY,	CASE NO CV 89-5321
Plaintiff,	**ORDER AND JUDGMENT**
vs.	
ROCKWELL INTERNATIONAL CORPORATION, AUTONETICS ELECTRONICS SYSTEMS,	DATE: July 23, 1990 TIME: 10:00 a.m. CRTM: Honorable
Defendants.	ROBERT C. BONNER

This matter came on regularly for hearing on the Motion for Summary Judgment of Defendant ROCKWELL INTERNATIONAL CORPORATION on July 23, 1990. Defendant appeared through its counsel of record, William R. Hartman,

Jr. Plaintiff appeared for himself. After having reviewed the record and all papers on file herein, and having considered the argument of counsel, both written and oral, the Court rules as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Summary Judgment shall be entered in favor of Defendant ROCKWELL INTERNATIONAL CORPORATION on all causes of action.

DATED: July 23, 1990

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 90-55974
CT/AG#: CV-89-5321-AAH

LLOYD VICKROY

Plaintiff/Appellant

vs.

ROCKWELL INTERNATIONAL CORPORATION,
AUTONETICS ELECTRONICS SYSTEMS,

Defendants/Appellee

APPEAL FROM the United States District Court for the Central District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was

duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered June 4, 1991.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LLOYD VICKROY	NO. 90-55974
	D.C. NO.
Plaintiff/ Appellant,	89-5321 RB (Ex)
	MEMORANDUM*
vs.	
ROCKWELL INTERNATIONAL,	
Defendant/ Appellee.	

Appeal from the United States District Court for the Central District of California
Robert C. Bonner, District Judge, Presiding

Submitted April 5, 1991**
Pasadena, California

Before: KOZINSKI AND O'SCANNLAIN,

Circuit Judges and MCNAMEE***
District Judge.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit R. 36-3.

** The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34(a), Ninth Circuit R. 34-4.

*** The Honorable Stephen M. McNamee, United States District Judge for the District of Arizona, sitting by designation.

OVERVIEW

Pro Se appellant, Lloyd Vickroy, appeals the District Court's grant of Appellee Rockwell's motion for summary judgment. Vickroy's complaint against his employer, Rockwell, alleged civil rights violations under 42 U.S.C. Sections 1981 and 1983, breach of union representation, breach of contract, unlawful discharge, unfair labor

practices, and intentional infliction of emotional distress. The District Court's decision is affirmed.

I

The District Court granted Defendant's Motion for Summary Judgment finding no triable issues of fact. The facts are not in dispute. This action arises from a delay in paying Vickroy for one day of overtime work. At the time of the alleged violations, Vickroy, a caucasian male, was a member of Local 2295 of the International Brotherhood of Electrical Workers ("union"). A collective bargaining agreement between the union and Vickroy's employer, Rockwell, was in place. The collective bargaining agreement clearly provided for resolution of disputes with respect to overtime pay. Vickroy filed a grievance in accordance with the

collective bargaining agreement. Rockwell agreed to pay the amount in question and Vickroy refused to accept the payment and filed a lawsuit against Rockwell instead. The union is not a defendant in this suit.

II

We review a District Court's decision to grant or deny a Motion for Summary Judgment de novo. Continental Casualty Co. v. City of Richmond, 763 F.2d 1076, 1078-1079 (9th Cir., 1985); Lew v. Kona Hospital, 754 F.2d 1420, 1423 (9th Cir., 1985). The standard is the same that is applied by the District Court under Federal Rule of Civil Procedure 56(c) and the District Court's decision will only be affirmed if the record, read in the light most favorable to the non-moving party, establishes

that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Continental Casualty Co. 763 F.2d at 1079. A motion for summary judgment against a party is appropriate when that party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corporation v. Catrett, 477 U.S. 317, 322 (1986).

A

42 U.S.C. Section 1981 grants all persons the same right to make and enforce contracts "as is enjoyed by white citizens." 42 U.S.C. Section 1981. There is no evidence to show that Mr. Vickroy was discriminated against by Rockwell based on his race in the making

and enforcing of a contract. First, Vickroy is a white male. Second, even if Vickroy could show he was somehow discriminated against, Section 1981 claims are limited to the making or enforcement of contracts. See Patterson v. McClean, 491 U.S. 164, 176 (1989). "The right to make contracts does not extend ... to conduct by employer after contract relation has been established, including breach of terms of contract ..." Id. at 177. Therefore, non-payment of overtime wages is not protected by Section 1981, and summary judgment is appropriate.

B

42 U.S.C. Section 1983 protects United States citizens from deprivation of rights by another person acting under color of state law. Because California state law requires arbitration of these

types of disputes, Vickroy argues that Rockwell, a private corporation, was acting as an agent of the state when it failed to pay him overtime wages. Vickroy has offered no evidence to raise any triable issues of fact that Rockwell was an agent of the State of California. Absent any showing that Rockwell was acting under color of state law when it failed to pay Vickroy overtime wages, summary judgment is appropriate. See Celotex, 477 U.S. at 322-23.

C

Vickroy also argues that he was denied fair representation by the union. The union, however, is not a party to this suit.

Vickroy sought compensation for one day of overtime work that was delayed. The union representative produced a check from Rockwell for the overtime

work which Vickroy refused to accept. There is absolutely no evidence to show that the union breached its duty to Mr. Vickroy. Vickroy has not designated any specific facts showing that there is a genuine issue for trial. Therefore, summary judgment is appropriate. See Celotex, 477 U.S. at 324.

Additionally, the statute of limitations on a claim of breach of the duty of fair representation is six months. DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 163-72 (1983); Kelley v. International Brotherhood of Electrical Workers, 803 F.2d 516, 518 (9th Cir., 1986). The alleged breach took place during the summer of 1988. Vickroy did not file his complaint until July 20, 1989. Because the statute of limitations has run on this claim, Vickroy is precluded

from raising this issue now, and summary judgment is appropriate.

D

Although it is not clear from the briefs, it appears that Vickroy's allegations of breach of contract, unlawful discharge, and unfair labor practices are all based on Rockwell's inability to pay him overtime wages in a timely manner. A collective bargaining agreement was in place which covered disputes over wages. The agreement included grievance procedures and an arbitration clause. Vickroy filed a grievance and Rockwell conceded to owing Vickroy overtime wages. If Vickroy was not satisfied with the outcome of the grievance proceeding, he could have requested arbitration. Vickroy argues that failure to arbitrate was Rockwell's fault. Rockwell, however, complied with

the grievance procedure by agreeing to pay the overtime wages. The arbitration clause included in the collective bargaining agreement was Vickroy's remedy. He failed to request such arbitration. Vickroy has made no showing to establish the existence of a triable issue of fact as to breach of contract, unlawful discharge, and unfair labor practices, therefore, summary judgment is appropriate. See Celotex, 477 U.S. at 322.

In addition, the statute of limitations on an action involving breach of a collective bargaining agreement is six months. DelCostello, 462 U.S. at 163-72; Kelley, 803 F.2d at 518. Because the statute of limitations has run on this claim, Vickroy is precluded from raising this issue now.

Furthermore, Vickroy's state law

claims are preempted by Section 301 of the Labor Management Relations Act because their resolution requires the interpretation of the collective bargaining agreement. Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 413 (1988); Harris v. Alumax Mill Products, Inc., 897 F.2d 400, 403 (9th Cir.). cert denied, 111 S. ct. 102 (1990).

E

Vickroy has offered no evidence to support a claim of intentional infliction of emotional distress. Absent any evidence of sufficiently outrageous conduct by Rockwell, Vickroy has failed to state a claim. McCabe v. General Foods Corp., 811 F.2d 1336, 1340 (9th Cir., 1987). Without any showing to establish this element of his case, summary judgment is appropriate. See

Celotex, 477 U.S. at 322.

Furthermore, Section 301 of the Labor Management Relations Act preempts Vickroy's claim of infliction of emotional distress that arises out of the same conduct which formed the basis of his claims of breach of contract, unfair labor practices, and unlawful discharge. Lingle, 486 U.S. at 425; Harris, 897 F.2d at 403.

F

Finally, Rockwell's request for attorney's fees based on the assertion that Vickroy filed a frivolous appeal is denied. Rockwell filed a cursory one and a half page brief which offered no guidance to this court on the issues or applicable law. Our expectation of practitioners in this court is much higher than was shown by Rockwell's counsel on this appeal. Therefore,

Rockwell's prayer for costs is denied.

III

No genuine issues of material fact are in dispute. Vickroy has made no showing sufficient to establish the existence of any element essential to his case. The District Court's decision granting summary judgment is affirmed.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LLOYD VICKROY,	NO. 90-55974
Plaintiff/Appellant	D.C. NO. CV89-5321-RB
vs.	ORDER
ROCKWELL INTERNATIONAL CORP., AUTONETICS ELECTRONICS SYSTEMS,	
Defendant-Appellee.	

Before: KOZINSKI and O'SCANNLAIN, Circuit Judges, and MCNAMEE*, District Judge.

The Petition for rehearing is denied.

* The Honorable Stephen M. McNamee, United States District Judge for the District of Arizona, sitting by designation.

UNITED STATES DISTRICT COURT

FOR THE STATE OF CALIFORNIA

LLOYD VICKROY,	NO. CV92-428-AAH
Plaintiff/Appellant	
vs.	ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
ROCKWELL INTER-NATIONAL CORP., AUTONETICS ELECTRONICS SYSTEMS,	
Defendant-Appellee.	

INTRODUCTION

In 1989, the Plaintiff, Lloyd Vickroy, filed suit in the United States District Court for the Central District of California against the Defendants, Rockwell International and various employees and agents of Rockwell, alleging numerous civil rights violations. Judge Robert Bonner granted

Defendant's motion for summary judgment, and the Ninth Circuit affirmed. Plaintiff has now filed ten new causes of action against these same Defendants, claiming that during the previous proceedings persons employed by Rockwell either made misrepresentations while under oath, or that they allowed others to state what they knew to be falsities in this court. Mr. Vickroy alleges that this alleged perjured testimony violated his right to due process under the Fifth Amendment to the United States Constitution. Defendants are now before this Court seeking summary judgment in the instant action because the issues raised by this case have been previously adjudicated.

DISCUSSION

I. Motion for Summary Judgment.

Plaintiff's complaint claims to

state a cause of action under the Fifth Amendment to the United States Constitution. However, Plaintiff is actually seeking to relitigate the issues previously decided in the underlying case of Lloyd Vickroy v. Rockwell International, CV 89-5321 RB (Ex). Plaintiff's current suit claims that various employees and agents of Rockwell lied under oath during proceedings relating to the underlying case. As the Plaintiff himself has admitted, the credibility of the testimony of these agents and employees of Rockwell was a material fact in the underlying case. (See Vickroy Deposition pg. 30, 41, 50, 106 and 107).

Since both the District and Court and the Ninth Circuit Court of Appeals decided that summary judgment under F.R.C.P. 56 was appropriate in the

underlying case, and therefore, that there was no genuine issue of material fact as to the credibility of these witnesses, this Court must also grant summary judgment on this same issue based upon the principle of res judicata. See Federated Department Stores, Inc. v. Moite, 452 U.S. 394 (1981) (Matters once tried shall be considered forever settled as between the parties). Therefore, Defendant's motion for summary judgment is GRANTED.

Based on the foregoing, IT IS ORDERED:

1. That Defendant's Motion for Summary Judgment is GRANTED.

The Clerk of the Court will serve copies of this order to all counsel of record.

DATED: October 26, 1992

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LLOYD VICKROY,	NO. 92-56469
	D.C. NO. CV-92-9428-AAH
Plaintiff/Appellant	ORDER
vs.	
ROCKWELL INTERNATIONAL CORP., AUTONETICS ELECTRONICS SYSTEMS	
Defendant-Appellee.	

Before: CANBY, FERNANDEZ, and T.G. NELSON,
Circuit Judges.

The Petition for rehearing is denied.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

LLOYD VICKROY,

Petitioner

vs.

ROCKWELL INTERNATIONAL CORPORATION,
AUTONETICS ELECTRONICS SYSTEMS,

Respondent

CERTIFICATE OF SERVICE

The undersigned, DEBBIE ANDERSON, of the Law Offices of DALE M. FIOLA, the Attorney for Petitioner, LLOYD VICKROY, hereby certifies that on the 13th day of January, 1994, she served the foregoing Petition for Writ of Certiorari on all the parties hereto, by mailing three copies by ordinary mail, postage pre-

paid, addressed as follows:

MACK & BERNSTEIN
Attorneys at Law
100 Peachtree Street, N.W.
Suite 600
Atlanta, Georgia 30303-1909

DEBBIE ANDERSON
1678 West Broadway
Suite 101
Anaheim, California 92802